Supreme Court, U.S.
FILED
961638 APR 15 1997
OFFICE OF THE CLERK

No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GERRY SCOTT,

Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IS USING THE " OBJECTIVELY REASONABLE" STANDARD OF *GRAHAM v. CONNOR*, 490 U.S. 386 (1989), IN A MANNER INCONSISTENT WITH THAT STANDARD CULMINATING IN DECISIONS THAT CONFLICT WITH OTHER UNITED STATES COURTS OF APPEALS DECISIONS IN U.S.C TITLE 42-1983 EXCESSIVE USE OF POLICE FORCE CLAIMS.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT THAT THE TORT OF MALICIOUS ABUSE OF CRIMINAL PROCESS DID NOT SUPPORT A CLAIM UNDER U.S.C. TITLE 42-1983 OR IN TORT LAW CONFLICTS WITH OTHER UNITED STATES COURTS OF APPEALS DECISIONS THAT RECOGNIZE THAT THE TORT OF MALICIOUS ABUSE OF CRIMINAL PROCESS DOES SUPPORT A CLAIM UNDER SECTION 1983 AND IN TORT LAW.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT THAT ENTERED JUDGMENT FOR THE DEFENDANTS IS VIOLATIVE OF SUPREME COURT CASE LAW WHICH REQUIRES A NEW TRIAL BE GRANTED WHERE THERE EXISTS CONFUSION OVER THE JURY'S INTENT ASSOCIATED WITH CONFLICTING THEORIES OF RECOVERY.

PARTIES TO PROCEEDINGS AT UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Appellee at the United States Court of Appeals for the D.C. Circuit was Gerry Scott.

The Appellants were the following:

The municipality of the District of Columbia

Miquel Mojica

Sergeant James Francis

Sergeant Hugo Hernandez

Leo Cannon

Vincent Spriggs

Kenneth Nelson

Clayton LeBoo

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The opinion of the United States court of appeals appears at Appendix A to the petition and is reported as *Gerry Scott v. District of Columbia et al.*, 101 F.3d 759 (D.C.Cir. 1996). The opinion of the United States District Court appears at Appendix B. It was not published. The *Caption is Gerry Scott v. District of Columbia et al.*, C.A. No 92-1601 3-16-94.

The Decision of the United States Court of Appeals denying the Motions for Rehearing and for Rehearing En Banc appears at Appendix C.

A copy of the Jury Verdict appears at Appendix D.

JURISDICTION

The United States Court of Appeals issued its decision on December 6, 1996.

A timely Petition for Rehearing and Petition for Rehearing En Banc was denied by the United States Court of Appeals on January 15, 1997, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.", Constitution of the United States of America, Amendment IV.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.", Constitution of the United States of America, Amendment V.

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.", 42 U.S.C. 1983.

STATEMENT OF THE CASE

This case arose when Gerry Scott, a black off duty police officer, became involved in a collision with four parked cars when he burned his hand while attempting to turn a corner and lost control of his vehicle.

The evidence adduced at trial proved a Hispanic police officer, defendant Miquel Mojica, was the first to arrive when police were called by neighbors. By the time he arrived on the scene, Gerry Scott, was wandering around the area in a dazed mental state after having cracked the windshield with his head during the collision. The young Hispanic police officer, made a cursory investigation, failing to ascertain if Gerry Scott were injured in the collision. The owners of the

damaged autos were on the scene and angrily demanding retribution. Because Gerry Scott was an off duty police officer, police officials were called to the scene. Due to his head injury, Gerry Scott was acting irratically causing one police officer to comment he did not appear intoxicated, but he was acting peculiar. A police regulation having the force of law was in effect in the District of Columbia that required police to immediately transport to a hospital a person where there existed a question as to whether the person was intoxicated or injured. Police did not follow this regulation, but decided to transport Gerry Scott to Traffic Division for administrative proceedings arising from the off duty car collision. En route to Traffic Division, Gerry Scott, demanded to be let out of the police cruiser which he had a right to do since he had not been arrested. He opened the door and began to walk down the street whereupon the transporting sergeants, Defendants Sergeants Hernandez and Francis, grabbed him by his shorts and called for back up. Several police cars responded to the scene.

Gerry Scott agreed to return to the police cruiser and go to Traffic, but he was thrown to the ground, belly down by the police who then knelt on his shoulders, neck and back and beat him with their knees until they ruptured his neck vertebrae, and severely injured his lower back which was diagnosed post trial as a ruptured lumbar disc.

At police headquarters the defendants, Mojica, Hernandez and Francis colluded together to falsify police reports to indicate that Gerry Scott had been arrested for DUI at the car accident scene. At the time of the event there existed in the District of Columbia a statute requiring police to observe a person operating a motor vehicle before he could be charged with DUI. Police defendants falsified their police reports to indicate Gerry Scott was seen operating his vehicle

and was wildly intoxicated in order to cover up their wrongdoing in seriously injuring him when he was not under arrest.

Some months later after three days of trial, the criminal charge of DUI was dismissed with prejudice for want of prosecution when Officer Mojica did not appear for trial.

Gerry Scott was served by the D.C. Police Department with an Adverse Administrative Proceeding seeking his dismissal from the police force, and was eventually terminated.

Gerry Scott filed suit at the United States District Court in Washington, D.C. seeking compensatory and punitive damages pursuant to U.S.C. Title 42-1983 for violations of his Constitutional rights under the Fourth and Fifth Amendments and for pendant common law tort claims. The case came on for Jury trial before Honorable Judge William Bryant, and the jury returned a verdict for Gerry Scott awarding him $550,000.00 in a combination of compensatory and punitive damages on the claims of violations of his Constitutional rights under the Fourth and Fifth Amendments for use of excessive police force, failure of the municipality to properly supervise and discipline its police members, false arrest, abuse of process, and negligence. During the trial there was a plethora of evidence introduced by Gerry Scott that he was not intoxicated, and in support of his claims.

Post trial the city and police officer defendants filed motions for judgment notwithstanding the verdict, for new trial, and remittitur. Those motions were denied by the trial judge, and the defendants appealed the case to the United States Court of Appeals for the District of Columbia Circuit.

The United States Court of Appeals for the District of Columbia Circuit did not accept the plaintiff's evidence,

disagreed with the facts and findings of the trial court, substituted its judgment for that of the jury, and misapprehended the law as it pertains to the issues of qualified immunity, excessive police force, abuse of process and the proper remedy to apply where there is a finding of confusion over the jury's intent or whether there were conflicting theories of recovery.

On December 6, 1996 the Court of Appeals entered judgment for the defendants.

On January 15, 1997 Gerry Scott's motions for rehearing and rehearing en banc were denied.

FEDERAL JURISDICTION IN DISTRICT COURT

Jurisdiction in the United States District Court for the District of Columbia was invoked pursuant to U.S.C. Title 28-1332(a) and U.S.C. Title 42-1983.

REASONS FOR GRANTING THE PETITION

The Reasonableness Standard as Applied Results in Disparate Treatment and Lack of Uniformity of Decisions Among The United States Courts of Appeals

The United States Court of Appeals for the District of Columbia Circuit has been increasingly aggressive in using appellate review in an inappropriate manner in U.S.C. Title 42-1983 claims of excessive police force. It is important for the Supreme Court to exercise its supervisory power in U.S.C. Title 42-1983 claims in order to establish uniformity of Decisions among the United States Courts of Appeals and to prevent disparate treatment.

The approach being utilized by the United States Court of Appeals for the District of Columbia Circuit since its

decision in *Wardlaw v. Pickett*, 1 F.3d 1297 (D.C. Cir. 1993) places undue influence on a hard and fast rule of law that the proper jury question regarding excessive police force is whether "the excessiveness of the force is so apparent that no reasonable officer could have believed in the lawfulness of his actions". In applying this standard of review, insufficient attention is placed on the circumstances surrounding the use of police force. By placing undue emphasis on the police officer's perspective, the end result is the jury verdicts are being vacated and judgment entered in favor of city officials and the municipality. The trend towards this approach was established in *Martin v. Malhoyt*, 830 F.2d 237 (D.C. Cir.) *reh'g denied*, 833 F.2d 1049 (D.C. Cir. 1987) in a simple parking infraction case of a limousine driver waiting for his passengers to return, the D.C. Circuit held it was not unreasonable or excessive police force for the police officer to grab the driver, throw him onto the driver's seat, and smash the car door into his leg when the driver was attempting to respond to police demands to show his license and registration. In *Wardlaw v. Pickett*, 1 F.3d 1297 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994), the District of Columbia Circuit Court citing as precedent *Graham v. Connor*, 490 U.S. 386 (1989) solidified that rule used in subsequent cases to strike down jury verdicts. In the instant case, the United States Court of Appeals for the District of Columbia Circuit in applying the *Wardlaw v. Pickett* rule, *supra*, held the beating of Gerry Scott by several burly police who repeatedly thrust their knees into the vertebrae of Gerry Scott's neck and back until his vertebrae ruptured when he was not under arrest at the time, was a fellow police officer who had already submitted to police demands and had agreed to get into the police vehicle was reasonable and not excessive police force. Obviously, the U.S. Court of Appeals for the District of Columbia Circuit is not taking into consideration

the factors this Honorable Court has held is necessary to determine whether the force was excessive such as whether the suspect is a perpetrator of a serious or violent crime, or a potential threat to public safety, *Graham v. Connor* , 490 U.S. 386 (1989). Other U.S. Court of Appeals decisions citing as authority *Graham v. Connor*, *supra*, reflect a different criteria to determine whether a police officer is entitled to qualified immunity or if the police force is excessive. Other circuits surveyed utilize a totality of the circumstances approach including consideration of such factors as whether it was necessary to use any force at all where the suspect has submitted to police authority, whether the injuries inflicted are severe, whether the injuries inflicted are lasting, or permanent, whether police were acting maliciously or sadistically, *Tatro v. Kervin*, 41 F.3d 9 (C.A. 1 Mass. 1994); *Servier v. City of Lawrence*, 60 F.3d 695 (U.S. Ct. App. 10th Cir. 1995).

Comparing similar cases from different circuit courts of appeals shows disparate treatment. For example, in the United States Court of Appeals for the District of Columbia Circuit, the court held police force was not excessive and qualified immunity was proper where police punched a person in the face and chest several times for approaching police, *Wardaw v. Pickett*, *supra*, while in *Thomas v. Slatter*, 20 F.3d 298 (C.A. 7 Ill. 1994), a single punch in the face was held to be excessive police force for which there was no qualified immunity. In *Gibeau v. Nellis*, 18 F.3d 107 (C.A. 2 N.Y. 1994), striking a suspect in the head three times with a flashlight was held to be a question for the jury to determine whether such force was excessive. Likewise in *Hale v. Townley*, 45 F.3d 914, 918 (5th Cir. 1995), the United States Court of Appeals for the Fifth Circuit held punching a suspect's testicles and slamming his head into a table without leaving any lasting effects was sufficient to state a claim for

excessive police force under 42 U.S.C. 1983. While the District of Columbia Circuit Court of Appeals has held grabbing and throwing a man onto his car seat and slamming the car door on his leg is not excessive police force, *Martin v. Malhoyt*, *supra*, or where several police officers throw a man onto the ground, jump on his neck, shoulders and back and beat him with their knees until they rupture his vertebrae is reasonable and not excessive police force, *Gerry Scott v. District of Columbia et al.*, 101 F.3d 759 (D.C. Cir 1996). It is interesting to note, in the cases cited from the District of Columbia Circuit none of the police victims had committed a criminal offense. While the United States Court of Appeals for the District of Columbia Circuit emphasizes primarily one standard in deciding issues of excessive force, the force must be so apparent that no reasonable officer could have believed in the lawfulness of his actions, other United States Courts of Appeals decisions cited herein use the totality of the circumstances approach to determine whether police used excessive force and arrive at Decisions diametrically opposed to those of the District of Columbia Circuit Court of Appeals. Other circuits apply the totality of the circumstances approach enunciated by this Honorable Court in *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) as:

> "whether the totality of the circumstances justifies a particular sort of seizure".

In *Dixon v. Richer*, 922 F.2d 1456, 1462 (10th Cir. 1991), The United States Court of Appeals for the Tenth Circuit sets forth the circumstances that must be considered when deciding whether the force used was excessive under the Fourth Amendment.

These are:

> "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."

See also, *Jackson v. Holyman*, 933 F.2d 401, 402 (6th Cir. 1991); *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991); *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992); *Frazell v. Flanagan,*, 102 F.3d 877 (7th Cir. 1996); *Hammer v. Gross*, 932 F.2d 842, *cert. denied* 112 S.Ct. 582 (C.A. 9th Cal. 1991); *Buckner v. Kilgore*, 36 F.3d 536, *reh. denied* (C.A. 6 Tenn. 1994); *Wilkerson v. Mills*, 65 F.3d 155 (C.A. 11 Fla. 1995); *Cook v. Sheldon*, 41 F.3d 73 (2nd Cir. 1994); *Alexsis v. McDonalds Restaurant of Mass. Inc.*, 67 F.3d 341 (C.A. 1 Mass. 1995); *Dory v. Ryan*, 25 F.3d 81 (C.A. 2 N.Y. 1994). There is some additional conflict of criteria used between the D.C. Circuit and other United States Courts of Appeals. In *Wardlaw v. Pickett*, supra, the D.C. Circuit held the standard to determine excessive force is an objective one without regard to the underlying intent or motivation while the United States Court of Appeals in the 7th Circuit for Illinois set forth the criteria that where force is applied "maliciously and sadistically and causes harm, it is violative of the Constitution", *Thomas v. Slatter*, *supra.* Thus it is seen there exists considerable conflict between the determinative factors used by the United States Court of Appeals for the District of Columbia Circuit and that used by the other appellate courts surveyed.

This Honorable Court's guidance is needed to correct the misapprehension of the governing law enunciated by the

United States Court of Appeals for the District of Columbia Circuit in *Wardlaw v. Pickett*, 1 F.3d at 1297 where the appellate court sets forth the primary consideration of excessive force and qualified immunity determination as:

> "The issues of whether an officer used excessive force and whether an officer is entitled to qualified immunity are determined according to a single standard. For both issues, the proper question for the jury is whether the excessiveness of the force is so apparent that no reasonable officer could have believed in the lawfulness of his actions."

Using that standard, the District of Columbia United States Court of Appeals is setting a dangerous precedent for the District of Columbia Circuit that makes it impossible to sustain a jury verdict for excessive police force as it enables the appellate court to ignore the evidence and usurp the province of the jury. By placing undue emphasis on the offending officer's perspective, a victim of police brutality will seldom be able to meet that stringent standard. It leads to judicial error and disparate, unfair results among the different United States Courts of Appeals. And it sends a dangerous signal to police officers that their errant behavior will be excused by the appellate court and makes the mean streets of the nation's capitol even meaner, unsafe for residents and visitors alike.

Abuse of Process Supports a U.S.C Title 42-1983 Claim

Where police officers collude together to falsify official police reports they are utilizing criminal process to impose criminal charges. Where the accused is arraigned and held in custody and a court issues legal process, the accused is deprived of his liberty and subjected to penalties. Where police do so in retribution or for a wrongful purpose,

procedural due process is violated, *ie.*, the right to liberty is violated by a distortion and corruption of the processes of law. Utilization of criminal process in such a manner is a denial of the Fifth Amendment Right to Due Process giving rise to a cause of action under U.S.C. Title 42-1983, *Cook v. Sheldon, supra*; *White v. Frank*, 855 F.2d 956, 961 n. 5 (2nd Cir. 1988); *Rose v. Bartle*, 871 F.2d 331, 350 n. 17 (3d Cir. 1989); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981).

State law defines the elements of abuse of process claims arising under U.S.C. Title 42-1983, *Wilson v. Garcia*, 471 U.S. 261, 277, 105 S. Ct. 1938, 1947, 85 L. Ed.2d 254 (1985).

In the District of Columbia abuse of process lies against a defendant who uses the legal system to pervert "the judicial process and achievement of some end not anticipated in the regular prosecution of the charge.", *Whelan v. Abel*, 953 F.2d 663, 670 (D.C. 1992; *Hall v. Field Enterprises*, 94 A.2d 479, 481 (D.C. Mun. Ct. 1953). Thus the District of Columbia recognizes the tort of criminal abuse of process.

In the instant case, Gerry Scott was subjected to criminal abuse of process. At the trial of the instant case, Gerry Scott proved by a preponderance of the evidence the police officer defendants, Mojica, Sergeant Hernandez and Sergeant Francis, falsified official police reports to cause Gerry Scott to be charged with criminal process by having him placed in police custody, arraigned and made to stand to answer to the charge of DUI. The evidence adduced at trial was the police defendants acted to harm Gerry Scott in order to prevent job recriminations and civil liability for visiting excessive police force against Gerry Scott at a time when he was not under arrest. Thus police officer defendants perverted the judicial process to achieve some end not anticipated in the regular

prosecution of the charge. Procedural due process forbids the use of legal process for a wrongful purpose, *Torres v. Superintendent of Police*, 893 F.2d 404, 410 (1st Cir. 1990); *Cook v. Sheldon*, at 80, *supra*; *Dory v. Ryan*, *supra*.

There is a distinction to be made between civil abuse of process claims and criminal abuse of process claims, *Cook v. Sheldon*, *supra*. The United States Court of Appeals for the District of Columbia failed to make that distinction and refused to recognize there exists under U.S.C. Title 42-1983 a cause of action for criminal abuse of process where a Constitutional deprivation results as in this case and misapprehended criminal abuse of process under District of Columbia law.

This Honorable Court should grant this petition to make decisions of the United States Courts of Appeals uniform in recognizing criminal abuse of process claims arising under U.S.C Title 42-1983.

The Decision of The United States Court of Appeals for The District of Columbia Circuit to Direct Verdict for Defendants Upon Finding There Was Confusion Over The Jury's Intent is in Conflict with Decisions of The Supreme Court and Other United States Courts of Appeals.

Where there exists confusion or an inability to discern the jury's intent among conflicting theories of recovery, this Honorable Court teaches it is reversible error to enter judgment for the defendant, *Weach & Dichmann v. Pugh Inc.*, 337 U.S. 801, 808-809 (1949). The Eighth Circuit in applying precedential case law established by this Honorable Court held in *Peterman v. Chicago Rock Island & Pacific R.R. Co.*, 516 F.2d 328, 334 (8th Cir. 1975) that where it is not possible to read the mind of jurors among conflicting

theories of recovery a new trial must be granted. Where answers to a verdict form do not sufficiently disclose the jury's intent, a new trial is mandated, *Erwin v. County of Manitowoc*, 872 F.2d 1292, (7th Cir. 1989). In *Gordon v. Degelmann*, 29 F.3d 295 (7th Cir. 1994) the appellate court teaches:

> "There is no priority among inconsistent verdicts and if the problem is not caught before the jury disbands, the proper thing to do is to hold a new trial with respect to all affected parties."

In this pending case, the District of Columbia Court of Appeals found based upon the evidence adduced at trial that Gerry Scott had not been arrested at the car accident scene by Defendant, Miquel Mojica, but was arrested by defendant, Sergeant Hernandez, after he exited the police vehicle while being transported to Traffic Division for an Administrative Action. But in an attempt to read the collective minds of the disbanded jury, the appellate court decided the jury found Gerry Scott was arrested by Defendant, Miquel Mojica, at the car accident scene for DUI and based on those findings held the jury verdict was, in part, based upon inconsistent theories of recovery. According to precedential case law established by this Honorable Court and the Decisions of other United States Courts of Appeals it was reversible error to direct verdict for the defendants. To ensure uniformity with precedential case law of this Honorable Court and among the United States Courts of Appeals and in fairness to the parties a new trial should have been granted.

CONCLUSION

Wherefore, for all the reasons set forth herein the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 16, 1996 Decided December 6, 1996

No. 95–7108

GERRY SCOTT,
APPELLEE

v.

DISTRICT OF COLUMBIA, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 92cv01601)

James C. McKay, Jr., Assistant Corporation Counsel, argued the cause for appellants, with whom *Charles F. Ruff*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *James A. DeVita*, Trial Assistant, were on

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

the briefs. *Edward E. Schwab,* Assistant Corporation Counsel, entered an appearance.

Joan A. Harvill argued the cause and filed the brief for appellee.

Before: SILBERMAN, RANDOLPH and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: This is an appeal by the District of Columbia and various members of the Metropolitan Police Department ("MPD") from the denial of a motion for judgment as a matter of law,[1] or in the alternative for a new trial or remittitur, after a jury awarded Gerry Scott compensatory and punitive damages as a result of his encounter with the police on July 9, 1991. Early that morning, a car driven by Scott, then an off-duty member of the MPD, crashed into four parked cars at an intersection on New Hampshire Avenue in Northwest Washington. Scott was subsequently arrested and charged with driving under the influence of alcohol ("DUI"). The DUI charge was ultimately dismissed after a police officer failed to appear for a court hearing, and Scott sued the District of Columbia and several MPD officers, alleging false arrest, malicious prosecution, abuse of process, use of excessive force to effect an arrest, assault and battery, and negligence. A jury found for Scott on the false arrest, excessive force, abuse of process, and negligence claims, and awarded $200,000 in compensatory damages and $300,000 in punitive damages.

The District and the officers (collectively "the District") contend that the evidence was insufficient to support the verdict on Scott's claims. We agree, and therefore reverse the denial of the District's motion for judgment as a matter of

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[1] Although the District's motion was styled as a motion for judgment notwithstanding the verdict, the 1991 amendments to Fed. R. Civ. P. 50 abandoned the terms "judgment notwithstanding the verdict" and "judgment n.o.v." The rule now speaks in terms of "judgment as a matter of law," and so do we.

law and remand with instructions to enter judgment for the District.[2]

I.

Viewed in the light most favorable to Scott, *see Mackey v. United States*, 8 F.3d 826, 829 (D.C. Cir. 1993), the evidence at trial showed that at approximately 2:15 a.m. on July 9, 1991, a car driven by Scott hit four unoccupied parked cars at the corner of New Hampshire Avenue and Otis Place. Several police officers responded to the scene; the first to arrive was Officer Mojica. Scott's behavior at the scene of the accident was erratic and belligerent. He acknowledged at trial that he cursed at Officer Mojica, and two people living in the area who observed the accident testified that Scott appeared to be intoxicated. Scott testified that he was not drunk, however, and that his behavior was due to disorientation and confusion as a result of a head injury suffered in the accident. He maintained that the accident occurred when he burned his hand on a piece of fried chicken that he was eating, and lost control of the car. While he acknowledged that he had been drinking several hours prior to the accident, he claimed that the effects of the alcohol had worn off by the time he began driving, at around midnight. He also offered the testimony of a toxicology expert, Dr. Leo Goldbaum, who stated that the effects of the alcohol would have worn off, at the latest, by 2 a.m.

Within an hour after the accident, two police lieutenants and two sergeants arrived on the scene. A lieutenant directed Sergeants Francis and Hernandez to take Scott to the MPD's Traffic Division. The sergeants, who were in uniform, did not put Scott in a secure vehicle normally used to transport prisoners that has a cage or a plexiglass screen between the front seats and the rear passenger seats, and rear passenger doors that cannot be opened from the inside. Instead, they placed him in a regular police cruiser. The

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[2] In light of our disposition, we do not reach the District's contentions relating to the award of punitive damages and various evidentiary rulings by the district court.

sergeants also did not handcuff Scott, search him, give him *Miranda*[3] warnings, or advise him that he was under arrest.

While on route to the Traffic Division, Scott became disoriented. He testified that he passed out, and that when he awakened, he did not realize where he was or who the officers were. At the corner of Ninth and T Streets, he attempted to exit the cruiser. Sergeant Hernandez, who was sitting to Scott's right in the back seat of the car grabbed him by the back of his pants to prevent him from escaping. Several police officers arrived on the scene, and Scott told Hernandez that he would get back in the car. Hernandez refused to let him back into the car, and several officers forced Scott to the ground and handcuffed him. At that point, the officers took Scott to the Traffic Division in a secure transport vehicle. Subsequently, at around 5 a.m., he was taken to the hospital, where he was examined, given a muscle relaxant, and referred to a neurologist.

After the accident, Scott was charged with DUI, in violation of D.C. Code § 40–716. The charge was dismissed with prejudice when Officer Mojica failed to appear for a court hearing. The MPD placed Scott on administrative leave. Nearly seven months after the accident, on January 31, 1992, Scott went to see the neurologist, Dr. William Lightfoote. Dr. Lightfoote examined Scott and reviewed the hospital records from the night of the accident, and concluded that he had suffered a vertebral concussion and a cervical disk herniation as a result of the accident.

Approximately one year after the accident, Scott filed this lawsuit, alleging constitutional false arrest and excessive force claims under 42 U.S.C. § 1983, as well as common law claims for assault and battery, false arrest, malicious prosecution, abuse of process, and negligence. The district court conducted the trial in two phases. In the first phase, the jury found the individual police officers liable for false arrest, excessive force, abuse of process, and negligence, and awarded compensatory and punitive damages. It found for the officers on the

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

assault and battery and malicious prosecution counts. In the second phase, the jury found the District liable for compensatory damages on the constitutional claims.[4] Because the District had previously stipulated that the officers were acting within the scope of their employment, the district court entered a judgment holding the District and the officers jointly and severally liable for all compensatory damages, and holding the officers individually liable for punitive damages. The district court denied the District's motion for judgment as a matter of law, or in the alternative, for a new trial or remittitur, and this appeal followed.

II.

We review de novo the district court's denial of a motion for judgment as a matter of law. *Ferguson v. F.R. Winkler GMBH & Co.*, 79 F.3d 1221, 1224 (D.C. Cir.), *cert. denied*, 117 S. Ct. 360 (1996); *McFarlane v. Caterpillar, Inc.*, 974 F.2d 176, 178 (D.C. Cir. 1992). Thus, the issue on appeal is whether there was sufficient evidence upon which the jury could base a verdict in Scott's favor. *Id.* In making that determination the court views the evidence in the light most favorable to Scott and resolves all conflicts in his favor. *Mackey*, 8 F.3d at 829. Although the court cannot substitute its view for that of the jury, and can assess neither the credibility nor weight of the evidence, the jury's verdict can only stand if the evidence in support of it is "significantly probative" and "more than merely colorable." *Ferguson*, 79 F.3d at 1224; *see also Siegel v. Mazda Motor Corp.* 878 F.2d 435, 437 (D.C. Cir. 1989). In other words, the jury's verdict will withstand challenge unless the evidence and all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not disagree on the

[4] The jury awarded a total of $80,000 in compensatory damages and $103,000 in punitive damages on the excessive force claim, $10,000 in compensatory damages and $63,000 in punitive damages on the false arrest claim, $10,000 in compensatory damages and $134,000 in punitive damages on the abuse of process claim, and $100,000 in compensatory damages on the negligence claim.

verdict. *Mackey*, 8 F.3d at 829 (citing *McNeal v. Hi–Lo Powered Scaffolding*, Inc., 826 F.2d 637, 640–41 (D.C. Cir. 1988)).

Under Rule 8(e)(2) of the Federal Rules of Civil Procedure, Scott could properly plead alternative theories of liability, regardless of whether such theories were consistent with one another. Similarly, Scott could properly argue alternative claims to the jury. *See, e.g., Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 343 (2d Cir. 1994). Recovery of damages, however, cannot be based on inconsistent theories when one theory precludes the other or is mutually exclusive. *Brookhaven Landscape & Grading Co. v. J.F. Barton Contracting Co.*, 676 F.2d 516, 523 (11th Cir. 1982); *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781, 801 (5th Cir. 1973). In support of the judgment Scott maintains on appeal that the police officers did not place him under arrest at the accident scene, and that, consequently, he was free to leave at any time. This position is consistent with his testimony at trial. Scott testified that he did not believe he was under arrest, and that he was simply being transported to the Traffic Division for administrative purposes. Similarly, Scott's expert in police practices, Dr. Alvin Cohn, testified that, in his opinion, Scott was not under arrest because the officers did not handcuff him, search him, place him in a secured vehicle, tell him he was under arrest, or read him *Miranda* warnings. Furthermore, in closing argument Scott's attorney told the jury that Scott was not under arrest, and that he "had every right in the world to get out of the car and walk away."

Many of the jury's determinations, however, can only rest on a finding that Officer Mojica arrested Scott at the accident scene. For example, the jury found Officer Mojica liable for false arrest. Scott also argued that the officers were negligent in failing to handcuff him or place him in a transport vehicle when the police first tried to take him to the Traffic Division. To the extent that the jury verdict against Officer Mojica on the negligence count rested on this theory, it was logically inconsistent with Scott's assertion that he was not under arrest. Of course, Scott had a sound tactical reason for

arguing to the jury that he was not arrested until after he attempted to exit the police cruiser. Scott's own testimony established that he was disoriented and confused, and the neighborhood residents who observed the crash testified that he was belligerent and that he appeared to be intoxicated. By having his counsel argue to the jury that the officers did not arrest him at the accident scene, Scott undercut the District's argument that his aggressive behavior justified the officers' actions, and strengthened his excessive force claim.

For purposes of appellate review, however, Scott cannot have it both ways at once. If he was not under arrest for the purposes of the excessive force claim, then he cannot recover on his other claims on the theory that he was under arrest. Indeed, on appeal, Scott does not expressly assert that Officer Mojica arrested him. Because Scott could not recover damages on separate theories for different claims where one theory precluded the other, *Brookhaven Landscape & Grading Co.*, 676 F.2d at 523, we abide by Scott's position, expressed both at trial and on appeal, that he was not arrested until after he attempted to exit the cruiser at the corner of Ninth and T Streets, and we review the sufficiency of his claims on that basis.

A.

False Arrest. The elements of a constitutional claim for false arrest are substantially identical to the elements of a common-law false arrest claim. *Dellums v. Powell*, 566 F.2d 167, 175 (D.C. Cir. 1977). For either type of claim, "[t]he focal point of the action is the question whether the arresting officer was justified in ordering the arrest of the plaintiff; if so, the conduct of the arresting officer is privileged and the action fails." *Id.* The instant case differs from the usual false arrest claim in a key respect, however. Most false arrest claims turn on the issue of whether the arresting officer had probable cause to believe that the arrestee committed a crime. *See, e.g., Martin v. Malhoyt*, 830 F.2d 237, 262–63 (D.C. Cir.), *reh'g denied*, 833 F.2d 1049 (D.C. Cir. 1987). Here, there is no serious question as to that issue.

Scott's erratic behavior, which his own medical expert described as consistent with intoxication, coupled with the fact that his vehicle had crashed into four parked cars, would lead any reasonable police officer to conclude that he had been driving under the influence of alcohol, regardless of whether he had actually committed that offense. Scott's false arrest claim hinges on a technicality of District of Columbia law. At the time of the arrest, the District adhered to the common-law rule that an officer was not authorized to arrest a suspect for a misdemeanor without a warrant unless the offense was committed in the officer's presence. D.C. CODE § 23–581(a)(1)(B) (1989).[5] Even though Officer Mojica had probable cause to believe that Scott was guilty of DUI, he lacked authority to make an arrest under District law if he did not see Scott operate the vehicle. *See Schram v. District of Columbia*, 485 A.2d 623, 624 (D.C. 1984).

It is far from clear that these circumstances implicate a violation of the Fourth Amendment that can give rise to a constitutional false arrest claim under § 1983. The Fourth, Fifth, and Ninth Circuits have held that the Fourth Amendment does not incorporate the common-law presence requirement for misdemeanor arrests, and that no cause of action exists under § 1983 unless the arresting officer lacked probable cause to believe a crime was committed. *Street v. Surdyka*, 492 F.2d 368, 371–73 (4th Cir. 1974); *Fields v. City of South* Houston, 922 F.2d 1183, 1189 (5th Cir. 1991); *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990); *see also Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J. dissenting). We need not decide this issue, however, because Scott pleaded both constitutional and common law false arrest claims, and in view of the identity of the underlying allegations, the constitutional claim cannot stand if the common law claim

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[5] The District of Columbia Code has since been amended to permit an officer to make a warrantless arrest for DUI, regardless of whether the offense is committed in his presence, if the officer has "reasonable grounds to believe that, unless the person is immediately arrested, reliable evidence of alcohol or drug use may become unavailable or the person may cause personal injury or property damage." D.C. CODE § 23–581(a)(1)(D) (1996).

fails for lack of sufficient evidence. We therefore analyze the false arrest claim solely with reference to District of Columbia law.

Initially, it is clear that Scott's false arrest claim against Officer Mojica is fatally undercut by his assertion that he was not arrested at the accident scene. Scott testified that he never saw Officer Mojica after he was placed in the cruiser. If Scott was not arrested until after he tried to exit the cruiser, then Officer Mojica did not arrest him. The District was therefore entitled to judgment on the false arrest claim against Officer Mojica.

Sergeants Francis and Hernandez, the other individual defendants to Scott's false arrest claim, are in a different position. They were present at the corner of Ninth and T Streets when Scott exited the cruiser. Furthermore, the evidence showed that even if Scott was not under arrest when he left the accident scene, he was under arrest by the time he left Ninth and T Streets. At that point, the sergeants had handcuffed him and placed him in a secure transport vehicle; in no sense was he free to leave. Thus, the jury could reasonably have found that Francis and Hernandez did arrest Scott at the corner of Ninth and T Streets.

Nonetheless, the judgment on the false arrest claim against Sergeants Francis and Hernandez cannot stand. Under District of Columbia law, a police officer may justify an arrest by demonstrating that "(1) he or she believed, in good faith, that his or her conduct was lawful, and (2) this belief was reasonable." *District of Columbia v. Murphy*, 631 A.2d 34, 36 (D.C.) (citations and internal quotation marks omitted), *on reh'g*, 635 A.2d 929 (D.C. 1993). The only evidence before the jury indicated that Sergeants Francis and Hernandez had a reasonable, good faith belief that Scott was in their custody and that they were entitled to prevent his escape. With respect to the key details of the events following the accident, the testimony of the two sergeants is in accord with Scott's own account. Scott testified that one of the police lieutenants who arrived on the scene had ordered him to report to the Traffic Division, so that a test could be administered, and that

the lieutenant instructed Francis and Hernandez to transport him. Francis offered a similar account, testifying that the lieutenant spoke with Scott, and then directed the two sergeants to take Scott to the Traffic Division, but not to handcuff him or to use a secure vehicle. Hernandez testified that the lieutenants on the scene told the sergeants to take Scott to the Traffic Division to administer a breathalyzer test and revoke Scott's police powers; he also testified that Scott had asked not to be handcuffed, and that the lieutenant had told them they did not have to handcuff him. Both sergeants testified that they understood Scott to be under arrest at the time.

Thus, the undisputed evidence establishes that Sergeants Francis and Hernandez were acting at the direction of a police lieutenant, who had ordered them to transport Scott to the Traffic Division so that he could take a breathalyzer test. The sergeants had ample probable cause to believe that Scott was guilty of DUI, given that Scott had crashed his car and was acting in a manner consistent with intoxication. Because the sergeants arrived on the scene after Officer Mojica, they could not have known from their own observations that he did not observe Scott operating or attempting to operate his vehicle, and that an arrest for DUI was not authorized under District of Columbia law. Under these circumstances, the sergeants were entitled to conclude that Scott was not free to leave, and to use reasonable force to prevent his escape from the cruiser. Because no reasonable jury could find to the contrary, the District was entitled to judgment on the false arrest claims against Officers Francis and Hernandez.

B.

Abuse of Process. The District also contends that Scott failed either to plead or prove a cause of action for abuse of process. Scott's theory at trial, which he pursues on appeal, is that the officers committed an abuse of process by instituting criminal proceedings against him for DUI with the ulterior aim of covering up their use of excessive force. Because this theory, as well as the evidence before the jury, fails to

state a claim for abuse of process, the judgment on that count cannot stand as a matter of law.

The essence of the tort of abuse of process is the use of the legal system "to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do." *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992); *see also Heck v. Humphrey*, 114 S. Ct. 2364, 2372 n.5 (1994); *Bd. of Educ. v. Farmingale Classroom Teachers Ass'n*, 343 N.E.2d 278 (N.Y. 1975). As the *Restatement of Torts* makes clear, the fact that a person acts spitefully, maliciously, or with an ulterior motive in instituting a legal proceeding is insufficient to establish abuse of process:

> [T]here is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant. Thus, the entirely justified prosecution of another on a criminal charge, does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm....
>
> For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

RESTATEMENT (SECOND) OF TORTS § 682 cmt. b (1977).

The evidence before the jury was insufficient to establish abuse of process. The fact that the officers expected to realize some benefit by covering up their own alleged wrongdoing simply points to an ulterior motive, not the kind of perversion of the judicial process that gives rise to a cause of action for abuse of process. In *Bown*, the District of Columbia Court of Appeals considered an abuse of process claim in

which a tenant alleged that her landlord sought to evict her so as to deprive her of her right to exercise an option to rent a separate basement apartment. The court held that this allegation, on its own, did not state a claim for abuse of process because "in addition to ulterior motive, there must have been a 'perversion of the judicial process and achievement of some end not contemplated in the regular prosecution of the charge.'"[6] 601 A.2d at 1080 (quoting *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. Cir. 1980)). In the instant case, the officers instituted the criminal charge for precisely the purpose for which it was intended: establishing that Scott was guilty of a criminal offense. Scott does not contend that the filing of criminal charges was intended to pressure him into taking any action or prevent him from taking action, or to achieve any other collateral purpose. Therefore, because no reasonable jury could have found that Scott established the essential elements of abuse of process, the District was entitled to judgment on that claim.

Neumann v. Vidal, 710 F.2d 856 (D.C. Cir. 1983), on which the district court relied, is not to the contrary. In that case, Neumann, a mechanical engineer, filed a patent application, and began preparations to market his product to the public. *Id.* at 858. A former employer sued him, alleging, *inter alia*, misappropriation of trade secrets and breach of fiduciary duty, and as a result, potential investors withdrew from Neumann's venture and his patent application suffered procedural delays. Neumann ultimately prevailed in the lawsuit,

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[6] The district court's instruction to the jury failed to make this distinction in Scott's case. The court instructed:

> In order to establish abuse of process, the plaintiff must demonstrate that the defendant used illegal processes for improper purposes in order to achieve an end not anticipated in the regular prosecution of the charge, that they proceeded against him for some ulterior reason.

Because the District did not note the failure of the instruction to inform the jury of an essential element of abuse of discretion either at trial or in its brief on appeal, however, we focus on the sufficiency of the evidence to support a claim of abuse of process.

and then sued the employer for antitrust violations and abuse of process. Ruling that he was barred by res judicata and collateral estoppel from raising the abuse of process claim, the district court granted summary judgment for the employer. *Id.* This court reversed, holding that Neumann was not precluded from raising the abuse of process claim. *Id.* at 860–61. The holding in *Neumann*, therefore, did not turn on the merits of the abuse of process claim. To the extent that *Neumann* may be read as a comment on the merits, it is readily distinguishable from the instant case. In *Neumann*, the plaintiff did allege a collateral purpose to the litigation: the alleged goal of the employer's lawsuit was to stifle competition by dissuading third parties from investing in the plaintiff's business venture, and to delay his patent application. Thus, the claim in *Neumann*, unlike that in the instant case, involved the type of extortionate activity that the *Restatement* and the case law describe.

C.

Negligence. The District also contends that Scott failed to prove negligence. In response, Scott offers a number of justifications to support the jury's conclusion that the officers were negligent. We address, however, only those theories of negligence that Scott presented at trial and the court instructed to the jury, *cf. Short v. UMW 1950 Pension Trust*, 728 F.2d 528, 532 n.6 (D.C. Cir. 1984): first, that the officers should have handcuffed Scott and placed him in a secure transport vehicle, and second, that the officers should have obtained prompt medical treatment for his injuries. Because the evidence was insufficient to establish negligence under either of these theories, the District was entitled to judgment on the negligence claim.

Scott's first theory of negligence is plainly inadequate to support the judgment. As to Officer Mojica, this theory suffers from the same defect as the false arrest claim: it is inconsistent with Scott's assertion that he was not arrested until he tried to exit the police cruiser at Ninth and T Streets. Scott cannot plausibly maintain that he was free to leave the

accident scene and argue at the same time that good police practice required Officer Mojica to handcuff him and place him in a vehicle from which he could not escape. Scott's expert in police procedures, Dr. Cohn, did not testify that police officers have any duty to handcuff or otherwise confine persons who are not under arrest, and Scott points to no other record evidence to support this peculiar theory. Furthermore, this theory cannot support the negligence verdict against the officers who were not present at the accident scene, but who participated in the arrest at Ninth and T Streets, because Scott was handcuffed and placed in a secure transport vehicle at that time.

Scott maintains, however, that if Sergeants Francis and Hernandez believed that he was under arrest, they should have handcuffed him and placed him in a secure vehicle. Scott offered no evidence to support this assertion. Dr. Cohn testified that the MPD's general orders do not require officers to handcuff persons arrested for misdemeanors unless the individuals are violent or aggressive. Both sergeants testified that their lieutenant directed them not to handcuff Scott and to transport him in a regular vehicle, and Scott offered no testimony to rebut this assertion. Given Scott's testimony that he was not violent or aggressive toward the officers, he cannot plausibly maintain that his behavior was so out-of-control that the sergeants were required to handcuff him despite their lieutenant's explicit instructions.

As to Scott's second theory of negligence, Scott failed to produce evidence of an applicable standard of care that required the officers to obtain immediate medical treatment for a person in Scott's position. It is well settled under District of Columbia law that a plaintiff in a negligence action must establish three elements: an applicable standard of care, a deviation from that standard by the defendant, and injury resulting from that deviation. *Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. 1988). Failure to prove a standard of care is thus fatal to a negligence claim. *District of Columbia v. Carmichael*, 577 A.2d 312, 314 (D.C. 1990). Furthermore, where the alleged negligent act is not "within the realm of common knowledge and everyday experience,"

proof of the applicable standard of care must be established by expert testimony. *Toy*, 549 A.2d at 6 (quoting *District of Columbia v. White*, 442 A.2d 159, 164 (D.C. 1982)).

Scott did not offer evidence of an applicable standard of care that would have required the officers to secure immediate medical care for him. His expert, Dr. Cohn, testified primarily as to the standards embodied in municipal regulations and the MPD's general orders.[7] Scott has not identified anything in either the regulations or the general orders, however, mandating that officers provide medical care where, as here, there is no visible evidence of injury or complaint by the person arrested.[8] Although Dr. Cohn did note that the

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[7] The District of Columbia Court of Appeals has held that the MPD's general orders, which are issued by the Chief of Police pursuant to a regulation, D.C. MUN. REG. tit. 6A, § 800.3 (1988) "essentially serve[ ] the purpose of an internal operating manual," and lack the force or effect of a statute or regulation. *Abney v. District of Columbia* 580 A.2d 1036, 1041 (D.C. 1990). Scott maintains that, as such, a violation of the general orders may serve as evidence of negligence. The District responds that the general orders do not suffice to establish a standard of care, absent other evidence that they conform to a national standard. We need not resolve this issue, however, because Scott has not identified any general orders that required the officers to provide him with prompt medical care, based on what they were able to observe at the accident scene.

[8] D.C. MUN. REGS. tit. 6A, § 200.19 (1988) provides that:

> In all cases of accident or illness requiring an officer's attention, members of the force shall render prompt assistance, taking any action as may be necessary in the premises.

In addition, D.C. MUN. REGS. tit. 6A, § 700.4 (1988) provides that:

> Where the condition of a prisoner is such that it is difficult to determine whether he or she is ill or intoxicated, or when a prisoner is taken ill in a station, he or she shall be immediately conveyed to a hospital.

Neither of these provisions indicates that the officers were under an obligation to transport Scott to the hospital. The first only requires officers to take such actions as they deem necessary, and the second is directed toward situations in which an officer cannot make a

MPD's standards are very similar to standards developed by the national Commission on Law Enforcement Accreditation Standards, his testimony indicates that the Commission's standards simply require police departments to have written policy guidelines, without specifying the content of any standards to which the guidelines must adhere. This point was corroborated by the District's expert in police procedures, Dr. Laurence Sherman, who acknowledged, during cross-examination by Scott's counsel, that the applicable Commission regulation merely requires that police departments have written rules that define when injured persons must be taken to medical facilities, and no more. Dr. Cohn offered no evidence of practices of police departments in other jurisdictions. *See District of Columbia v. Peters*, 527 A.2d 1269, 1273 (D.C. 1987).

Dr. Cohn's testimony was insufficient to enable a jury reasonably to conclude that the officers breached a duty of care as to Scott. Had Dr. Cohn testified that, in his opinion, based on a reasonable degree of professional certainty, a recognized standard of care required that the officers investigating the accident scene should have immediately taken Scott to the hospital, the evidence would have been sufficient to support the verdict. Yet in his testimony, Dr. Cohn referred to a standard of care governing medical treatment on only a few occasions. He did not allude to any recognized standard of care that would have required the officers to obtain medical care for Scott, despite the fact that Scott neither complained of pain nor appeared to suffer from any serious injuries. In contrast, Dr. Sherman testified that the officers were under no duty to transport Scott to a hospital, as evidenced by the following exchange:

> [Counsel for the District]. All right. Would the national standard of care have required that the officers in this case immediately transport Officer Scott to a hospital rather than to the Traffic Division?

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reasonable determination as to whether a prisoner requires immediate medical care.

> [Dr. Sherman]. No. In this case where the testimony that I have reviewed is consistent that there is no visible injury and there was no complaint of pain by the plaintiff until after going to the Traffic Division, and according to Sergeant Schaefer's testimony, as my recollection, after he'd been there 30 minutes, that without the complaint of pain and without visible injury that's visible without taking clothes off and doing a medical exam, police officers, under national practices with which I'm familiar from 25 years of observations, police officers are not under any duty to transport people involved in accidents to a hospital simply because they've been involved in an accident. Again, you have to have that visible sign of injury or complaint of pain.

Of course, if Dr. Cohn's testimony had directly contradicted Dr. Sherman's assertion on this point, the jury would have been entitled to credit his testimony over Dr. Sherman's. But in the absence of any statement by Dr. Cohn that a national or other standard of care required that a person in Scott's position be taken immediately to the hospital, no reasonable jury could have found that the officers' conduct deviated from the applicable standard of care. Hence, the District was entitled to judgment on the negligence claim.

D.

Excessive Force. The District also contends that the evidence was insufficient to establish that the police used excessive force against Scott in arresting Scott at the corner of Ninth and T Streets. The relevant inquiry in a constitutional excessive force claim stemming from an arrest is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The subjective "good faith" of the officers is irrelevant. *Id.* Even where an officer's use of force is motivated by malice, a plaintiff cannot demonstrate excessive force if the mode of arrest is one that a reasonable

officer might have applied. *Id.; see also Martin*, 830 F.2d at 262. Nor, in this circuit, is good faith a relevant consideration in determining whether qualified immunity shields an officer from liability for damages. *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994); *cf. Graham*, 490 U.S. at 399 n.12. Instead, the issues of whether an officer used excessive force and whether an officer is entitled to qualified immunity are determined according to a single standard. For both issues, the proper question for the jury is whether "the excessiveness of the force is so apparent that no reasonable officer could have believed in the lawfulness of his actions." *Wardlaw*, 1 F.3d at 1297.

Although we evaluate the reasonableness of the officers' actions by viewing the events from their perspective, we consider the facts in the record and all reasonable inferences derived therefrom in the light most favorable to Scott. *Id.* at 1303. Scott testified that when he attempted to exit the police cruiser at the corner of Ninth and T Streets, Sergeant Hernandez grabbed him by the back of his pants to prevent his escape. As soon as Scott saw the other police cars arrive, he offered to get back in the car. Hernandez responded by cursing at Scott, and telling him he could not get back in the car because he "would probably do something stupid like kick the windows out." At about the same time, Officer Cannon, who had arrived in one of the other cars, struck Scott once, knocking him off balance and causing him to bend over and to raise his arms by the side of his head in a "defensive manner." At this point, Scott began screaming that he was a police officer and that he had not done anything wrong. Cannon and Officer Spriggs then grabbed Scott and "slammed" him to the ground. Scott hit the ground on his back, and the officers proceeded to roll him over, putting their knees on his neck, back, and lower legs. The officers handcuffed him and "dragged" him to a police transport vehicle. At least five officers were involved in this confrontation: Hernandez, Cannon, Spriggs, and Officers LeBoo and

Nelson.[9]

Viewing this confrontation, as we must, from the perspective of a police officer on the scene "in a quickly developing situation," *Martin*, 830 F.2d at 261, we conclude that the degree of force used to arrest Scott was not so excessive that no reasonable officer could have believed in the lawfulness of his actions. As discussed in connection with the false arrest claim, *see supra* Part II.A, Sergeant Hernandez reasonably believed that Scott was under arrest and in his custody. Under these circumstances, he was entitled to use reasonable force to prevent Scott from escaping. The fact that Scott offered to return to the police cruiser did not eliminate the need for force. Hernandez could reasonably conclude at that point that he needed to place Scott in restraints, to prevent him from escaping a second time. Furthermore, given Scott's erratic behavior, it was reasonable for Hernandez, who was in the back seat of the car, to seek assistance from other officers in subduing Scott who was outside of the car.

Again, viewing the confrontation from an "objectively reasonable" standpoint, Scott's description of the level of force used by the officers does not indicate that it was excessive. Scott essentially testified that Cannon struck him once, and that the officers then knocked him to the ground, rolled him over, and pinned him with their knees so that he could be handcuffed. Although Scott repeatedly testified that the officers were "beating" him with their knees, he did not indicate that anyone ever kicked him or struck him, apart from the one blow delivered by Officer Cannon. Even were the measures that the officers employed to appear excessive "with the 20/20 vision of hindsight," *Graham*, 490 U.S. at 396, the Supreme Court has instructed that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Id.* (citations and internal quotations omitted).

Under a "reasonableness" standard balancing the infringement of the individual's interest caused by the police action

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[9] Sergeant Francis, who was driving the police cruiser that Scott attempted to exit, did not take part in the physical confrontation.

against the governmental interest served by that action, this court held in *Martin* that the plaintiff, a limousine driver waiting to pick up passengers, had failed to show excessive force where a police officer " 'brutally grabbed" him around the waist as he was attempting to respond to the officer's request for his license and vehicle registration, threw him into the drivers seat, and slammed the car door on his leg. 830 F.2d at 240, 262. While acknowledging that slamming the car door on the plaintiff's leg appeared to be malicious and "causes us to pause," the court concluded that the officer's "total conduct, objectively appraised, added up to a reasonable mode of arrest." *Id.* at 262. In *Wardlaw,* the court concluded that no reasonable jury could find excessive force was used where the plaintiff rushed at two United States Deputy Marshals who were forcibly removing a friend of his from a courtroom, and one of the deputies punched the plaintiff once in the jaw and two or three times in the chest. 1 F.3d at 1300, 1303–04. The court noted the circumstances of enhanced security at the courthouse as a result of anticipated demonstrations, the vulnerability of the marshals in the stairwell, and the fact that the plaintiff had shouted at the deputies not to hurt the spectator as he came toward them. *Id.* at 1304.

As in *Martin* and *Wardlaw,* the proper inquiry here is whether the officers' actions were so excessive that no reasonable officer on the scene could have believed that they were lawful. All of the officers' actions were reasonably calculated toward the goal of securing Scott and placing him in handcuffs, while minimizing his opportunity to escape. Nothing in the record indicates that they used more force than reasonably appeared necessary to achieve that goal. To the contrary, the evidence indicates that following his release from the hospital, Scott did not consider it necessary to seek further medical attention. *Cf. Wardlaw,* 1 F.3d at 1304 & n.7. Even when he went to see Dr. Lightfoote six months later, he claimed only that he had been injured in a car accident and did not mention a subsequent confrontation with the police. We conclude, therefore, that the jury could not reasonably find for Scott on the excessive force claim, absent

some consideration of improper matters such as the subjective intent of the officers.

III.

When an appellate court determines that a district court erred in denying a party's motion for judgment as a matter of law, it has three options. It can direct the district court to enter judgment for that party, order a new trial on its own motion, or remand the case to the district court to determine whether a new trial is appropriate. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 329 (1967); *see also* Fed. R.Civ.P. 50(d). Because the facts, viewed in the light most favorable to Scott, indicate that he cannot recover on any of his claims, there is no basis for affording Scott a new trial. Accordingly, we reverse the order denying the District's motion for judgment as a matter of law, vacate the judgment for Scott, and remand the case with instructions to enter judgment for the District.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 92-1601 (WBB)

GERRY SCOTT,

Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

[Filed, MAR 30 1995, Clerk, U.S. District Court, District of Columbia]

ORDER

Having considered the Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, or Remittitur and to stay the Enforcement of the Judgment until this Motion is Decided, Plaintiff's Motion to Enter Judgment Pertaining to Equitable Relief Requested, and Plaintiff's Motion for Interest on Judgment, the opposition to each, and the entire record in this case, it is, for the reasons given in the accompanying memorandum, this 30th day of March, 1995, hereby

ORDERED that the Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, or Remittitur and to Stay the Enforcement of the Judgment until this Motion is Decided is DENIED; it is hereby

FURTHER ORDERED that the Plaintiff's Motion to Enter Judgment Pertaining to Equitable Relief Requested is DENIED; and it is hereby

FURTHERED ORDERED that the Plaintiff's Motion for Interest on Judgment is GRANTED. The Defendants shall pay interest on the judgment from March 16, 1994, the date of entry of judgment, until the date of payment, at the rate of 4% per annum.

It is so ordered.

/s/ William B. Bryant
William B. Bryant
Senior United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 92-1601 (WBB)

GERRY SCOTT,

Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

[Filed, MAR 30 1995, Clerk, U.S. District Court, District of Columbia]
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MEMORANDUM

Before the Court are Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, or Remittitur and to Stay the Enforcement of the Judgment until this Motion is Decided, Plaintiff's Motion to Enter Judgment Pertaining to Equitable Relief Requested, and Plaintiff's Motion for Interest on Judgment. The Court will deny the first two motions and grant the third.

The basic facts in this case are as follows. Early on the morning of July 9, 1991, Plaintiff Gerry Scott, an off-duty Metropolitan Police Department (''MPD'') officer, crashed his car into several cars parked on New Hampshire Avenue, N.W., in the District of Columbia, during which he sustained a concussion. Defendant Miguel Mojica was the first MPD officer to arrive on the scene of the accident, at which point Scott was walking in the street. Two additional defendant police officers, Sergeants Hugo Hernandez and James E. Francis II, later arrived on the scene. None of these officers checked Scott for injuries or had him transported from the accident scene to the hospital. Instead, Hernandez and Francis placed Scott unhand-cuffed in a

patrol car for transportation to the MPD Traffic Division. Scott did not believe that he was under arrest, but rather that his police powers would be revoked and he would be subject to administrative procedures.

At 9th and T Streets, N.W., Scott, who was disoriented, got out of the patrol car. Hernandez stopped him by grabbing him by the pants. The other individual Defendants, Officers Kenneth Nelson, Leo Cannon III, Vincent T. Spriggs, and Clayton LeBoo, Jr., then arrived on the scene, and Scott told Hernandez he would get back in the car. Hernandez refused to let Scott get back in the car because he said that Scott would do something stupid like kick out the car's windows.

Cannon approached Scott and struck him in the face, at which point Scott crouched down and tried to protect his head with his arms. LeBoo attempted to put his arms through Scott's arms and grasp him from behind. Cannon and LeBoo then forced Scott to the ground on his stomach. They turned him over and Hernandez, Cannon, Nelson, and LeBoo then got on Scott's back and neck and began kneeing him, while Spriggs straddled Scott's lower legs. Scott complained that he was injured. His two arms were cuffed together between his legs, and he was placed in a paddy wagon and transported to the Traffic Division.

At the Traffic Division, Sergeant James Schaefer asked Scott to take a breathalyzer test, but he declined and again said he was injured. Scott was then transported to D.C. General Hospital, and was later arraigned in D.C. Superior Court, at some point having been arrested for driving under the influence of alcohol ("DUI").

As a consequence of the assault at 9th and T, Scott suffered a herniated disk in his neck that caused a 10% disability, as well as intermittent memory loss, pain in the lumbar region of his back, stiffness in his legs, numbness in his right foot, discomfort in his neck and right shoulder, and headaches. In October 1992, Scott lost his job at the

MPD — in which his base salary was $28,000 annually, $40,000 counting overtime — after administrative hearings that followed the incident, and he had been unable to find other work. He spent over $5,000 defending himself against the DUI charge, which was later dismissed with prejudice in D.C. Superior Court because Mojica failed to appear. He also suffered mental and emotional distress following the assault and his arrest for DUI.

Trial began on February 8, 1994, and on February 25, 1994, the jury, after six days of deliberations, returned a verdict for Plaintiff against the seven individual Defendants — Mojica, Hernandez, Francis, Nelson, Cannon, Spriggs, and LeBoo — on four counts: two constitutional claims arising under 42 U.S.C.A. § 1983 (West 1994), arrest without probable cause and use of excessive force in an arrest; and two common law counts, abuse of process and negligence.[1] On March 4, 1994, the same jury rendered a verdict against the District of Columbia on the constitutional counts. On March 16, 1994, the Court entered a judgment on the verdict on the four counts against the seven individual Defendants and the District of Columbia.[2]

The jury awarded $80,000 compensatory damages to Plaintiff on his claim of excessive force, assessed against the District and Defendants Hernandez, Francis, Nelson, Cannon, Spriggs, and LeBoo, and punitive damages of $18,000 each against Hernandez, Francis, Nelson, Cannon, and LeBoo, and $13,000 against Spriggs. It awarded $10,000 compensatory damages on Plaintiff's claim of arrest

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[1] The jury also returned two verdicts for the Defendants: for the District and Defendants Hernandez, Francis, Nelson, Cannon, Spriggs, and LeBoo on Plaintiff's claim of assault and battery; and for the District and Defendants Mojica, Hernandez, Francis, Nelson, Cannon, Spriggs, and LeBoo on Plaintiff's claim of malicious prosecution.

[2] The Court entered judgment against the District on the common law counts pursuant to its stipulation before trial that the individual Defendants, at the time all employees of the District's MPD, were acting within the scope of their employment.

without probable cause, assessed against the District, Mojica, Hernandez, and Francis, as well as punitive damages of $19,000 against Mojica and $22,000 each against Hernandez and Francis.

The jury awarded $10,000 compensatory damages on Plaintiff's claim of abuse of process, assessed against the District, Mojica, Hernandez, Francis, Nelson, Cannon, Spriggs, and LeBoo, as well as punitive damages of $26,000 against Mojica, $30,000 each against Hernandez and Francis, and $12,000 each against Nelson, Cannon, Spriggs, and LeBoo. Finally, the jury awarded $100,000 compensatory damages on Plaintiff's claim of negligence, assessed against the District and Mojica,[3] Hernandez, Francis, Nelson, Cannon, Spriggs, and LeBoo.

The District is therefore liable for $200,000 in compensatory damages; Mojica is liable for $120,000 compensatory damages and $45,000 punitive damages; Hernandez and Francis are each liable for $200,000 compensatory damages and $70,000 punitive damages; Nelson, Cannon, and LeBoo are each liable for $190,000 compensatory damages and $30,000 punitive damages, and Spriggs is liable for $190,000 compensatory damages and $25,000 punitive damages.

I. Motion for Judgment as a Matter of Law[4]

The Defendants moved for judgment as a matter of law at the conclusion of Plaintiff's case, again before the Court

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[3] The Court corrected the Judgment on the Verdict in an order dated January 18, 1995, to add Mojica on the negligence count, and on January 25, 1995, Mojica filed a Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, or Remittitur and to Stay the Enforcement of the Judgment until this Motion is Decided, in which he adopted the other Defendants' arguments as to negligence.

[4] The 1991 Amendment to Federal Rule of Civil Procedure 50 abandoned the terminology "directed verdict" and "judgment notwithstanding the verdict" and substituted "judgment as a matter of law." The Court treats the Defendants' Motion for Judgment Notwithstanding the Verdict as a Motion for Judgment as a Matter of Law. Fed. R. Civ. P. 50 advisory committee's note to 1991 Amendment, subdivision (a).

submitted the case to the jury, and they have now renewed their motion.

A. Standard

In deciding a motion for judgment as a matter of law, the Court must give the jury's decisions "the utmost of deference and respect." *Morgan v. District of Columbia,* 824 F.2d 1049, 1056 (D.C. Cir. 1987). The Court must let the jury's verdict stand unless "the Court, after viewing all the evidence, together with all inferences reasonably to be drawn, in the light most favorable to the successful party, determines that the evidence is so overwhelmingly in favor of the other party that reasonable [people] could not disagree." *Boutros v. Riggs National Bank, D.C.,* 655 F.2d 1257, 1258 (D.C. Cir. 1981). The Court does

> not weigh the evidence; [it is] required to evaluate the evidence under the presumption that the jury resolved all factual disputes in favor of the prevailing party. Moreover, [it] must give the advantage of every fair and reasonable inference to the prevailing party. Finally, [it] may not assess the credibility of the witnesses; that function is reserved exclusively for the jury.

Morgan, 824 F.2d at 1056.

Arrest without Probable Cause

Under normal circumstances, "probable cause exists if the totality of the circumstances, as viewed by a reasonable and prudent police officer in light of his training and experience, would lead that police officer to believe that a criminal offense has been or is being committed." *United States v. Green,* 670 F.2d 1148, 1152 (D.C. Cir. 1981). District of Columbia law in 1991 provided that "[a] law enforcement officer may arrest, without a warrant having previously been issued therefor[,] . . . a person who he has probable cause to believe has committed or is committing an offense in his presence." D.C. Code Ann. § 23-581(a)(1)(B) (1989 Re-

placement). As a consequence, "[p]robable cause to believe that a misdemeanor has just been committed prior to the arrival of the police does not satisfy the District of Columbia's warrantless arrest requirements." *United States v. Williams,* 754 F.2d 1001, 1002 (D.C. Cir. 1985) (citing *Schram v. District of Columbia,* 485 A.2d 623 (D.C. 1984) and *District of Columbia v. Perry,* 215 A.2d 845 (D.C. 1966)).

Mojica arrested Scott for DUI, D.C. Code Ann. § 40-716(b) (1990 Replacement), which is a misdemeanor office, *Schram,* 485 A.2d at 624. To arrest Scott legally for DUI, Mojica must have had probable cause to believe that Scott committed the offense in his presence. *Williams,* 754 F.2d at 1002. A mere reasonable belief that Scott *had* been operating a vehicle before Mojica arrived does not suffice.[5] *Id.* Therefore, "a reasonable and prudent police officer" could not have believed Scott's arrest to be lawful if he did not observe him operate a motor vehicle.

A reasonable jury could have found that Mojica never observed Scott operating a motor vehicle. Mojica was the first police officer to arrive at the scene of the accident. He testified that he arrived with his police lights flashing, that he observed Scott attempting to drive his car away from the scene, and that Scott was able to drive his car about ten feet, but it repeatedly stalled. Scott testified that his car would not operate and that he was out of his car when Mojica arrived on the scene. In addition, two bystanders, Patricia Hill and Cynthia Abroms, testified that, when the first police officer

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[5] Defendants have made a supplemental filing in which they argue that the court in *Schram* had concluded that an arrest for driving while under the influence, although invalid, was nevertheless made with probable cause; they also cite *Allison v. United States,* 623 A.2d 590 (D.C. 1993), to support this argument. (Supp'l Mem. of Law in Supp. of Def.' Mot. for J.N.O.V at 4-5.)

As the discussion in the text should make clear, Defendants' argument has no merit. Moreover, as Defendants themselves note, they acceded to the relevant instruction at trial. (*Id.* at 2.)

arrived, Scott was not in his automobile but rather was walking on the street. A reasonable jury could credit the testimony of Scott, Hill, and Abroms.[6]

C. Use of Excessive Force

Use of excessive force is a violation of the Fourth Amendment, "which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." *Graham v. Connor,* 490 U.S. 386, 394 (1989) (ellipses in original). Factfinders must judge claims of use of excessive force against a reasonableness standard, one that "is not capable of precise definition or mechanical application." *Id.* at 396 (quotation omitted). "[I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, " *id.,* and allowance must be made "for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation," *id.* at 397.

Defendants argue that, for several reasons, Plaintiff's testimony at trial was inherently incredible: he was able to identify by name the Defendants who hurt him and what they did to him even though he had not been able to do so in his deposition, and, on two occasions following the incident,

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[6] To leading questions put by defense counsel, Abroms seemed to misidentify the first officer on the scene as Hernandez. A reasonable jury could have instead credited her testimony about the coincidence of two events: the first police car with flashing lights (Mojica's car) arrived while Scott was walking in the street.

Scott said his injuries were due to the accident, and did not mention the assault at 9th and T. Moreover, Defendants argue that Plaintiff's testimony is at odds with the testimony of ten other witnesses, including six Defendants and four other police officers.

Plaintiff's testimony was not inherently incredible; to the contrary, if any testimony adduced at the trial verged on the incredible, it was that of some of the Defendants. Moreover, the Defendants brought these points out when they cross-examined Scott, and a reasonable jury could evaluate their credibility. A reasonable jury could find that, even after Scott had agreed to get back in the police cruiser, Defendants Hernandez, Nelson, Cannon, LeBoo, and Spriggs had forced the Plaintiff to the ground and knelt on his back, that Scott's injuries resulted from this assault at 9th and T Streets, and that this use of force was excessive given the totality of the circumstances.

The Plaintiff did not testify that Defendant Francis was one of the Defendants who physically subdued him at 9th and T Streets, yet the jury returned a verdict against Francis on the excessive force count. Defendants therefore argue that the Court should vacate the judgment against Francis on this count. However, Sergeant Francis is liable for use of excessive force because he failed to intercede on Scott's behalf when the other Defendants used excessive force. *O'Neill v. Krzeminski,* 839 F.2d 9, 11-12 (2d Cir. 1988) (collecting cases); *see also United States v. Reese,* 2 F.3d 870, 887-90 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 928 (1994) (upholding conviction under 18 U.S.C. § 242 for standing by while other officers used excessive force). The Court will therefore not vacate the jury's verdict as to Francis on this count.

Abuse of Process

To establish abuse of process, the Plaintiff had to show a "perversion of court processes to accomplish some end which the process was not intended by law to accomplish, *or*

which compels the party against whom it has been used to do some collateral thing which he could not legally and regularly be compelled to do." *Neumann v. Vidal,* 710 F.2d 856, 860 (D.C. Cir 1983) (emphasis added) (quotations omitted). Defendants argue that this standard requires a showing of extortion and, because they never attempted to extort something from Scott, there was no abuse of process.

Such is not the case. Plaintiff argued at trial, and a reasonable jury could believe based on the testimony, that the Defendants charged Scott with DUI in an attempt to justify their use of excessive force against him. The Court finds that justifying use of excessive force is an "end [that] the process was not intended by law to accomplish." *Neumann,* 710 F.2d at 860; *see also e.g., id.* (business alleged to have abused patent and state court processes "in order to block [another business] from competition" with it). Given the law and evidence, a jury could reasonably find that Defendants committed an abuse of process.

E. Negligence

Defendants make five arguments as to why they are entitled to judgment as a matter of law on Plaintiff's negligence count.

First, Defendants argue that, because Count VII in the Complaint only contained allegations that Defendants negligently failed to transfer Scott to the hospital after the automobile accident, and not, for example, that the Defendants failed to handcuff Scott or to transport him in a special transport vehicle, the Court should have stricken these latter claims at trial.

The Defendants are mistaken. "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (footnote omitted). Plaintiff was not required to plead the theory on which it ultimately recovered.

International Distrib. Corp. v. American Dist. Tel. Co., 569 F.2d 136, 139 (D.C. Cir. 1977). Indeed, the Complaint gave Defendants adequate notice of the negligence theory. *See, e.g., Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 790 (6th Cir. 1984) (complaint alleging breach of implied warranty gave notice of strict liability and failure to warn theories). Moreover, Plaintiff's pretrial statements gave notice of this theory. (*See* Amendment to Pl.'s Pretrial Statement at 2 (filed June 3, 1993) & Pl.'s Supplement to Pretrial Statement Ex. List at 1-2 (filed June 11, 1993).)

Second, Defendants argue that Plaintiff failed to make his prima facie case of negligence in three different ways. Plaintiff's prima facie case required that he establish, first, what the applicable standard of care was, second, that the Defendants deviated from that standard of care, and third, that there was a causal connection between the deviation and the injuries sustained by Plaintiff. *Toy v. District of Columbia,* 549 A.2d 1, 6 (D.C. 1988).

The Defendants argue that the testimony of Plaintiff's expert Dr. Alvin Cohn did not establish a "national standard of care." In *District of Columbia v. Peters,* 527 A.2d 1269 (D.C. 1987), an expert testified that police departments throughout the country offered training on handling mentally ill people and persons under the influence of drugs and he mentioned several specific departments that provided such training. *Id.* at 1273. The District argued that, because the plaintiff's expert could not testify to the specific content of the training that the other departments offered, "he was not an expert whose testimony could establish a national standard of care." *Id.* at 1273 n.2. However, the court held that his testimony did establish the standard of care required. *Id.* at 1273. In *Toy,* the MPD had failed to provide oxygen and other emergency equipment when an arrestee hung himself in the Traffic Division's jail cell, and the court held that expert testimony that the Boston police department had

oxygen and other emergency equipment did not establish the required "national standard of care." *Toy,* 549 A.2d at 7-8.

Dr. Cohn testified about the standard of conduct required by the MPD General Orders and that these standards were similar to those found in a publication of the "Commission on Law Enforcement Accreditation Standards." Through Dr. Cohn's testimony, "the jury was made aware of recognized standards," which it could take as establishing the standard of care. *Peters,* 527 A.2d at 1273; *see also Bell v. Jones,* 523 A.2d 982, 989 (D.C. 1986) (holding that expert who stated "that the only standards of care of which he was aware governing the conduct of surveyors in the District of Columbia were those established by the American Lane Title Association" was "properly qualified as an expert").

The Defendants also argue that MPD General Orders requiring, for example, that Defendants handcuff Plaintiff, transport him in a secure vehicle, transport him to a hospital more quickly than they did, and that they investigate the accident scene more thoroughly cannot serve as evidence of negligence. In the District of Columbia, unexplained violation of a statute or regulation that has the purpose of protecting a person like the plaintiff or of preventing the type of accident that occurred is a violation of the standard of care. *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.,* 534 A.2d 1268, 1273 (D.C. 1987). Violation of a statute or regulation may serve merely as evidence of negligence when the statute or regulation has no public safety purpose or when it has a public safety purpose but the defendant has offered evidence excusing its violation of the statute or regulation. *Id.* at 1274.

This analysis does not apply directly to the MPD General Orders because "[a]gency protocols and procedures, like agency manuals, do not have the force or effect of a statute or an administrative regulation." *Wanzer v. District of Columbia,* 580 A.2d 127, 133 (D.C. 1990). Therefore, just as MPD General Orders cannot create a special duty to a

protected class,[7] *Morgan v. District of Columbia,* 468 A.2d 1306, 1317-18 (D.C. 1983), violations of MPD General Orders cannot be considered negligence *per se.*[8]

However, when officials have a statutory, regulatory, or common law duty, agency protocols or orders "provide [them] with guidance on how they should perform those duties." *Wanzer,* 580 A.2d at 133. The Court therefore finds that MPD General Orders, whose purpose is to protect a person like the Plaintiff or to prevent the type of accident that occurred, may serve as *evidence* of negligence. *See District of Columbia v. Banks,* 646 A.2d 972, 983 (D.C. 1994) (Farrell, J., concurring) ("A proper instruction would have told the jury that a failure to heed the guidance of the general order was a factor it could consider, but that the determination whether [the officer] was grossly negligent must be made by considering the totality of the circumstances."); *see also Toy,* 549 A.2d at 7.

The Defendants also argue that Plaintiff's intervening negligent or criminal behavior in attempting to flee the scene broke the chain of causation between the individual Defendants' actions and Plaintiff's injuries; that is, they were not the proximate cause of the Plaintiff's injuries. *E.G., McKethean v. Washington Metro. Area Transit Auth.,* 588 A.2d

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[7] The Defendants argue that the MPD General Orders can create no duty toward Scott. That is beside the point, because at the accident scene and thereafter when the Defendants had Scott in custody, they had a duty to treat him according to the standard of care, *Toy,* 549 A.2d at 6, of which the orders serve as evidence.

[8] An MPD General Order may also not have the direct affect of expanding the *District's* liability. For example, the District of Columbia Court of Appeals has rejected the use of an MPD General Order to define "emergency vehicle" narrowly, because such use would expand the District's waiver of severeign immunity by limiting the circumstances in which the District is liable only for grossly negligent use of emergency vehicles. *Abney v. District of Columbia,* 580 A.2d 1036, 1040-41 (D.C. 1990).

708, 716 (D.C. 1991). However, as the District of Columbia Court of Appeals has said of proximate cause and the negligence *per se* rule:

> The essence of that rule is that the conduct of the defendant or his agent was negligent precisely because it created a risk that a third person would act improperly. In such circumstances, the fact that a third person does act improperly is not an intelligible reason for excusing the defendant.

Rong Yao Zhou, 534 A.2d at 1277 (quotations omitted). The Court finds this reasoning to apply as well when MPD General Orders serve as evidence of negligence. The orders to handcuff an arrestee and transport him in a vehicle without handles on the rear doors — which Defendants did not follow — were designed, in part, to prevent the behavior in which Scott engaged, whether improper because criminal or negligent, and so Scott's behavior does not break the causal link. *See also Peters,* 527 A.2d at 1273 ("When . . . the judicially-developed defenses of contributory negligence and assumption of the risk conflict with the purposes of statutes or regulations, those defenses do not bar recovery.").

Finally, Defendants argue that Plaintiff has failed to show that he was injured by their negligence beyond the injuries he experienced as a result of their use of excessive force, but Plaintiff argued that Defendants were negligent in part because they failed to transfer him quickly from the scene of the accident to a hospital. A reasonable jury could compensate Scott for the anguish, pain, and suffering that resulted from the delay, which injuries are distinct from those that are attributable to the injuries caused by Defendants' use of excessive force. (*See also* Part II.D. *infra.*)

F. Common Law Claims against the District of Columbia

Because a reasonable jury could determine that various individual Defendants perpetrated an abuse of process and were negligent, and because the District of Columbia

conceded that the individual Defendants were acting within the scope of their employment, it follows, as Defendants concede, that the District of Columbia is jointly and severally liable with the individual Defendants for the actual damages caused by their common law torts.

G. Constitutional Claims against the District of Columbia

The District makes three arguments against its liability for the constitutional violations, none of which has merit. First, it attempts to import the negligence standards of District of Columbia tort law to argue that Plaintiff had to produce evidence of a "national standard of care" to show that the District negligently trained, supervised, and disciplined its police officers. Under 42 U.S.C. § 1983, a municipality is liable for the damages actually caused by its policies or customs. *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978). Failing to take action may amount to a policy or custom, *City of Canton v. Harris,* 489 U.S. 378, 387 (1989), and a municipality may be liable for an unconstitutional result caused by a constitutional policy or custom if it shows "deliberate indifference to the rights of persons," *id.* at 388.

The Court finds that, based on the evidence, including that of Plaintiff's expert Dr. Cohn, a reasonable jury could conclude that the District had a "custom" of dilatory investigation of citizen complaints of excessive force filed against its officers in the Civilian Complaint Review Board (CCRB); moreover, because the need for prompt investigation and discipline of such reports is so obvious and the CCRB's inadequacies were so likely to result in constitutional violations, a reasonable jury could conclude that the District had shown "deliberate indifference" to the problem. *Cox v. District of Columbia,* 821 F. Supp. 1, 12-13 (D.D.C. 1993), *aff'd per curiam,* No. 93-7103, 1994 U.S. App. LEXIS 30,756 (D.C. Cir Oct. 28, 1994).

Second, the District argues that its actions with regard to civilian complaints are not the proximate cause of Plaintiff's

injuries. Yet a reasonable jury could find, based on the evidence, that the Districts's custom of delayed investigation of civilian complaints and discipline of police officers permitted serious police misconduct because officers knew that punishment would never occur, or would occur only at some remote future time. In other words, official tolerance of police misconduct would result in similar unlawful actions in the future. *Id.* 19-20. This theory of causation is broad; it seemingly allows liability in *any* case charging police misconduct because *any* officer knows of the CCRB's inadequacies and delays. However, in this case, that civilians had lodged complaints — even if unsubstantiated because uninvestigated — against some of the individual Defendants shows that it was foreseeable that at least those officers would use excessive force against another civilian.

Third, Defendants argue that liability based on *Cox* violates the doctrine of separation of powers, under which "any decision that is made with respect to matters of public policy" — such as funding and staffing of the CCRB — "should be protected from liability." (Defs.' Mem. at 95.) However, policies in violation of the constitutional rights of citizens are not protected by this doctrine and are clearly actionable under 42 U.S.C. § 1983.

Motion for New Trial, or Remittitur

Defendants may make a motion for new trial by jury "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). When reviewing a motion for new trials, the Court must "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 553 (1984). Indeed,

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any

> of the parties is ground for granting a new trial . . . , unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding *must* disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed. R. Civ. P. 61 (emphasis added). Moreover, "disposition of such a motion is a matter committed to the sound discretion of the trial court." *Morgan,* 824 F.2d at 1063.

A. Weight of the Evidence

Defendants argue that the jury's verdict is against the weight of the evidence, but as should be clear from the discussion of the evidence above, that is not the case.

B. Evidentiary Rulings

The Defendants also assail various evidentiary rulings of the Court. The Defendants argue that the Court improperly excluded evidence. First, the Court excluded evidence of Scott's earlier arrest on domestic violence charges, which Defendants say was relevant to rebut his claim that the arrest in this case was humiliating and that it led to a loss of a family relationship. Second, the Court excluded evidence that would have shown that Scott was never tried and therefore not found innocent of the DUI charge, as well as the reasons the DUI charge was dismissed, which Defendants argue would have rebutted the impression that there was no substantial basis for the DUI charge against Scott. Third, the Court did not allow Sergeant Goodwin, who was not on Defendants' witness list and who would have impeached Scott's statement that he had refused Sergeant White's request that he take a blood test at D.C. General Hospital, to testify. Fourth, the Court admitted Mojica's diagram of the accident scene but excluded the rest of the report, which included Mojica's notation that Scott was "attempting to flee the scene," as well as descriptions of interviews of other

witnesses. Finally, the Court excluded evidence of reforms instituted at the CCRB.

The Defendants also argue that the Court improperly admitted evidence. First, the Court admitted Dr. Cohn's expert testimony, which Defendants argue lacked an adequate factual foundation because he cited, but did not quote, written national authority. Second, the Court admitted MPD General Orders as evidence of negligence. Third, the Court allowed Plaintiff to call several Defendants to testify in rebuttal. Fourth, Defendants argue that the Court allowed Plaintiff in rebuttal to address issues never mentioned by either party before, namely, a written report of Sgt. Andrew White in which he revoked Plaintiff's police powers and noted that Plaintiff was "unable to sign the notice of revocation." Fifth, the Court allowed Officer Melvin Johnson to testify in rebuttal. Sixth, the Court admitted the testimony of Diana Haines about the CCRB. Seventh, the Court admitted the civilian complaints before the CCRB against Defendants Francis and Cannon.[9]

The Court has examined these alleged evidentiary errors, many of which it has already addressed in Part I *supra,* and has concluded that, if errors they be, both separately and cumulatively, they caused no unfair prejudice to the substantial rights of the parties and "do not affect the essential fairness of the trial." *McDonough Power Equip.,* 464 U.S. at 553.

C. Jury Instructions

Defendants argue that the Court improperly gave the jury an instruction that MPD General Orders are evidence of

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[9] Citing *District of Columbia v. Barriteau,* 399 A.2d 563, 566-69 (D.C. 1979), the Defendants also argue that, because Plaintiff presented no economist to testify about the present value of lost future wages, the Court improperly allowed the Plaintiff to argue for them in his closing. *Barriteau* merely held that it was not error to allow an economist to testify about the value of future lost wages given future inflation. *Id.*

negligence and that, because Scott drank and drove, attempted to escape, and violently attempted to resist arrest, it was improper not to give jury instructions on contributory negligence and assumption of risk. For the reasons discussed in Part I *supra,* these arguments have no merit as to the negligence claim.[10] In addition, the Court properly refused to instruct the jury on contributory negligence and assumption of the risk as to the excessive force count. *Peters,* 527 A.2d at 1274.

Defendants argue that the Court should have clearly instructed jurors that the individual Defendants would be responsible for any judgment against them; they claim that the jury was under the mistaken impression that the District would pay both compensatory and punitive damages. However, one of the jury's notes clearly indicated that the jury thought that the District would be responsible for paying the compensatory damages and that the individual Defendants would be responsible for paying their own punitive damages.

Because of the District's stipulation that the individual Defendants were acting within the scope of their employment, the jury correctly believed that the District would pay (or be jointly and severally liable with the individual Defendants to pay) the actual damages on the Plaintiff's common law claims. Although the jury may have incorrectly believed that the District would also be liable to pay for Plaintiff's constitutional claims (which was not the case until, in the second part of the trial, the jury found the District liable on those counts), the Court had also instructed the jury to compensate Scott for the value of his injuries, whatever their value and without considering from whom the money would come or any Defendant's ability or inability to pay. If there was error, it was harmless.

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[10] Defendants also assert that the Court instructed the jury that violation of MPD General Orders was negligence *per se,* but they are mistaken.

D. The Jury Form

Defendants also argue that the jury form allowed for duplicative compensatory damages with regard to the two counts of use of excessive force and negligence and with regard to the two counts of arrest without probable cause and abuse of process, because the injuries complained of as a result of each pair of counts were the same. As discussed above, Plaintiff has identified injuries caused by Defendants' failure to transport him from the accident scene to a hospital that are independent from the injuries caused by Defendants' use of excessive force. Likewise, the emotional and mental distress that resulted from the arrest without probable cause are distinct from the costs to defend associated with the abuse of process. In addition, each of these pairs of counts went against different groups of Defendants, and so, to the extent the injuries do overlap, the jury could be understood to be allocating the damages according to the extent each group was responsible for the injuries. The Defendants have failed to identify "readily identifiable sums" that the jury should not have awarded because duplicative. *Carter v. District of Columbia,* 795 F.2d 116, 134-35 (D.C. Cir. 1986); *see also Gentile v. County of Suffolk,* 926 F.2d 142, 153-54 (2d Cir. 1991) (affirming awards of $75,000 each on federal and state counts of malicious prosecution).

In addition, Defendants argue that, because the jury form invited the jury to assess punitive damages against each Defendant on each count (except negligence), it allowed the jury to award duplicative and excessive punitive damages against each Defendant. Instead, the Court finds that the form allowed the jury to assign a reasonable punitive damage, which it did, for each distinct instance of wrongdoing by each individual Defendant.

E. Remittitur

The Defendants also ask the Court to offer Plaintiff remittitur or a new trial, arguing that the jury's awards of punitive damages will destroy the individual Defendants, and

that the errors in the jury instructions (about who would pay damages) and in the jury form allowed duplicative awards, *see Carter,* 795 F.2d at 134-35, and so the compensatory and punitive damage awards are "excessive," *Afro-American Publishing Co. v. Jaffe,* 366 F.2d 649, 662 (D.C. Cir. 1966).

The Court does not find the punitive damage awards to be excessive; they will be a hardship for the individual Defendants to pay, but not one that will destroy them or is excessive as punishment for the wrong-doing of which the jury found them culpable. Because the Court finds no error, or at most harmless error, as to the jury instructions and the jury form, it will not offer remittitur to the Plaintiff; nor is the jury's award of compensatory damages "beyond all reason" or "so great as to shock the conscience." *Frank v. Atlantic Greyhound Corp.,* 172 F. Supp. 190, 191 (D.D.C. 1959).

III. Plaintiff's Request for Equitable Relief

The Plaintiff has moved the Court to expunge and seal his record of arrest for DUI, his DMV records relating to the arrest for DUI, and all related court records, arguing that they affect his ability to obtain employment and automobile insurance. The Court has the equitable power to grant the relief that Plaintiff requests "when serious governmental misbehavior leading to the arrest, or unusually substantial harm to the defendant not in any way attributable to him, outweighs the government's need for a record of the arrest." *Doe v. Webster,* 606 F.2d 1226, 1231 (D.C. Cir. 1979). Although the courts have exercised this equitable power in "special circumstances" involving arrests without probable cause, *id.* at 1231 & 1231 n.9 (collecting cases), this case does not present such a special circumstance. Nor does the Court find that this case presents "*flagrant* violations of the Constitution." *Id.* at 1231 (emphasis added) & 1231 n.10 (collecting cases). The Court therefore declines to exercise its equitable power and Plaintiff's motion will be denied.

IV. CONCLUSION

For the foregoing reasons, the Court will deny Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, or Remittitur and to Stay the Enforcement of the Judgment until this Motion is Decided. It will also deny Plaintiff's Motion to Enter Judgment Pertaining to Equitable Relief Requested. However, it will grant Plaintiff's Motion for Interest on Judgment. An order to that affect will accompany this memorandum.

/s/ William B. Bryant
William B. Bryant
Senior United States District Judge

Date: March 30, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 92-1601 (WBB)

GERRY SCOTT,

Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

[Filed, (illegible) 1994, Clerk, U.S. District Court, District of Columbia]

[United States District Court for the District of Columbia,
A TRUE COPY, Nancy Mayer-Whittington, Clerk,
by /s/ Bryant Johnson, Deputy Clerk, Sept 2, 1994]

JUDGMENT ON THE VERDICT

This cause having been tried by the Court and a Jury, before the Honorable William B. Bryant, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict of the Jury,

IT IS ORDERED, that, as to plaintiff's claim of excessive force, judgment is entered in favor of plaintiff, GERRY SCOTT:

i. against the defendants, DISTRICT OF COLUMBIA, HUGO HERNANDEZ, JAMES E. FRANCIS II, KENNETH NELSON, LEO CANNON III, VINCENT T. SPRIGGS, and CLAYTON LeBOO, JR., jointly and severally, in the sum of Eighty Thousand Dollars ($80,000) compensatory damages;

ii. against the defendant, HUGO HERNANDEZ, in the amount of eighteen thousand dollars ($18,000) punitive damages;

iii. against the defendant, JAMES E. FRANCIS II, in the amount of eighteen thousand dollars ($18,000) punitive damages;

iv. against the defendant, KENNETH NELSON, in the amount of eighteen thousand dollars ($18,000) punitive damages;

v. against the defendant, LEO CANNON III, in the amount of eighteen thousand dollars ($18,000) punitive damages;

vi. against the defendant, VINCENT T. SPRIGGS, in the amount of thirteen thousand dollars ($13,000) punitive damages; and

vii. against the defendant, CLAYTON LeBOO, JR., in the amount of eighteen thousand dollars ($18,000) punitive damages;

IT IS FURTHER ORDERED, that, as to plaintiff's claim of arrest without probable cause, judgment is entered in favor of plaintiff, GERRY SCOTT;

i. against the defendants, DISTRICT OF COLUMBIA, MIGUEL MOJICA, HUGO HERNANDEZ, and JAMES E. FRANCIS II, jointly and severally, in the sum of Ten Thousand Dollars ($10,000) compensatory damages;

ii. against the defendant, MIGUEL MOJICA, in the amount of nineteen thousand dollars ($19,000) punitive damages;

iii. against the defendant, HUGO HERNANDEZ, in the amount of twenty-two thousand dollars ($22,000) punitive damages; and

iv. against the defendant, JAMES E. FRANCIS II, in the amount of twenty-two thousand dollars ($22,000) punitive damages;

IT IS FURTHER ORDERED, that, as to plaintiff's claim of assault and battery, judgment is entered in favor of the defendants, DISTRICT OF COLUMBIA, HUGO HER-

NANDEZ, JAMES E. FRANCIS II, KENNETH NELSON, LEO CANNON III, VINCENT T. SPRIGGS, and CLAYTON LeBOO, JR., and plaintiff, GERRY SCOTT, shall take nothing;

IT IS FURTHER ORDERED, that, as to plaintiff's claim of malicious prosecution, judgment is entered in favor of the defendants, DISTRICT OF COLUMBIA, MIGUEL MOJICA, HUGO HERNANDEZ, JAMES E. FRANCIS II, KENNETH NELSON, LEO CANNON III, VINCENT T. SPRIGGS, and CLAYTON LeBOO, JR., and plaintiff, GERRY SCOTT, shall take nothing;

IT IS FURTHER ORDERED, that, as to plaintiff's claim of abuse of process, judgment is entered in favor of plaintiff, GERRY SCOTT:

i. against the defendants, DISTRICT OF COLUMBIA, MIGUEL MOJICA, HUGO HERNANDEZ, JAMES E. FRANCIS II, KENNETH NELSON, LEO CANNON III, VINCENT T. SPRIGGS, and CLAYTON LeBOO, JR., jointly and severally, in the sum of Ten Thousand Dollars ($10,000) compensatory damages;

ii. against the defendant, MIGUEL MOJICA, in the amount of twenty-six thousand dollars ($26,000) punitive damages;

iii. against the defendant, HUGO HERNANDEZ, in the amount of thirty thousand dollars ($30,000) punitive damages;

iv. against the defendant, JAMES E. FRANCIS II, in the amount of thirty thousand dollars ($30,000) punitive damages;

v. against the defendant, KENNETH NELSON, in the amount of twelve thousand dollars ($12,000) punitive damages;

vi. against the defendant, LEO CANNON III, in the amount of twelve thousand dollars ($12,000) punitive damages;

vii. against the defendant, VINCENT T. SPRIGGS, in the amount of twelve thousand dollars ($12,000) punitive damages; and

viii. against the defendant, CLAYTON LeBOO, JR., in the amount of twelve thousand dollars ($12,000) punitive damages; and

IT IS FURTHER ORDERED, that, as to plaintiff's claim of negligence, judgment is entered in favor of plaintiff, GERRY SCOTT against the defendants, DISTRICT OF COLUMBIA, HUGO HERNANDEZ, JAMES E. FRANCIS II, KENNETH NELSON, LEO CANNON III, VINCENT T. SPRIGGS, and CLAYTON LeBOO, JR., jointly and severally, in the sum of One Hundred Thousand Dollars ($100,000) compensatory damages.

The clerk shall fix plaintiff's costs.

NANCY MAYER-WHITTINGTON, Clerk

BY: /s/ Linda L. Ramero
Deputy Clerk

Approved: /s/ William B. Bryant
William B. Bryant
Senior United States District Judge

Dated: March 15, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 92-1601 (WBB)

GERRY SCOTT,

Plaintiff,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

[Filed, MAR 16 1994, Clerk, U.S. District Court, District of Columbia]

[United States District Court for the District of Columbia,
A TRUE COPY, Nancy Mayer-Whittington, Clerk,
by /s/ Bryant Johnson, Deputy Clerk, Sept 2/1994]

ORDER

WHEREAS the jury found that the District of Columbia was liable for the individual defendants' violations of the constitutional rights of the plaintiff; and

WHEREAS the District of Columbia stipulated that, as to the plaintiff's counts of assault and battery, malicious prosecution, abuse of process, and negligence, each of the defendants, Miguel Mojica, Hugo Hernandez, James E. Frances II, Kenneth Nelson, Leo Cannon III, Vincent T. Spriggs, and Clayton LeBoo, Jr., was an employee of the District of Columbia acting in the scope of his employment, it is by the Court

ORDERED that the defendant, the District of Columbia, shall be jointly and severally liable, along with the individual defendants whom the jury found liable, for the compensatory damages that the jury awarded on plaintiff's

counts of use of excessive force, arrest without probable cause, abuse of process, and negligence.

So ORDERED this 15th day of March, 1994.

/s/ William B. Bryant
William B. Bryant
Senior United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1996

No. 95-7108
92cv1601

Gerry Scott,

Appellee

v.

District of Columbia, Office of the Mayor, et al.,

Appellants

[Filed, JAN 15 1997, Clerk, United States Court of Appeals for District of Columbia Circuit]

BEFORE: Silberman. Randolph and Rogers, Circuit Judges.

ORDER

Upon consideration of appellee's petition for rehearing filed January 6, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1996

No. 95-7108
92cv1601

Gerry Scott,

Appellee

v.

District of Columbia, Office of the Mayor, et al.,

Appellants

[Filed, JAN 15 1997, Clerk, United States Court of Appeals for District of Columbia Circuit]

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsberg, Henderson, Randolph, Rogers and Tatel, Circuit Judges.

ORDER

Upon consideration of appellee's Suggestion for Rehearing *In Banc*, and the absence of a request by any member for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No: 92- 1601

GERRY SCOTT

Plaintiff

v.

DISTRICT OF COLUMBIA GOVERNMENT, et al.,

Defendants

VERDICT FORMS

We, the Jury unanimously find:

AS TO THE CLAIM OF EXCESSIVE FORCE

(1) Was excessive force used against plaintiff, Gerry Scott?

Yes X No _____

If YES, indicate whether or not you so find as to each of the following defendants:

Sgt. Hernandez Yes
Sgt. James Francis Yes
Officer Nelson Yes
Officer Cannon Yes
Officer Spriggs Yes
Officer Le Boo Yes

If you found against one or more of the above defendants on this count, what compensatory damages do you award plaintiff, Gerry Scott, to compensate him for this count?

$ $80,000

If you have found against one or more of the above defendants on this count, what punitive damages do you award plaintiff, Gerry Scott, for this count as against the following defendants:

Sgt. Hernandez $ 18,000
Sgt. James Francis $ 18,000
Officer Nelson $ 18,000
Officer Cannon $ 18,000
Officer Spriggs $ 13,000
Officer Le Boo $ 18,000

AS TO THE CLAIMS RELATING TO DUE PROCESS AND ARREST WITHOUT PROBABLE CAUSE

(2) Was plaintiff, Gerry Scott, arrested by one or more of the defendants without probable cause on the misdemeanor charge of DUI?

Yes X No _____

If YES, indicate whether or not you find that one or more than one of the following defendants was responsible for making or ordering the arrest without probable cause on the misdemeanor offense of DUI:

Mr. Mojica Yes
Sgt. Hernandez Yes
St. James Francis Yes

If you have found against one or more of the defendants on this count, what compensatory damages do you award Gerry Scott to compensate him for this count?

$ 10,000

If you have found against one or more of the defendants on this count, state the amount of punitive damages you award Gerry Scott from the following defendants:

Mr. Mojica $ 19,000
Sgt. Hernandez $ 22,000
St. James Francis $ 22,000

AS TO THE CLAIMS OF ASSAULT AND BATTERY

(3) Was an assault and/or a battery committed against plaintiff, Gerry Scott?

Yes _____ No X

If YES, indicate whether or not you so find as to one or more of the following defendants:

Sgt. Hernandez _____
Sgt. James Francis _____
Officer Nelson _____
Officer Cannon _____
Officer Spriggs _____
Officer Le Boo _____

If you have found against one or more of the defendants on this count, what compensatory damages do you award Gerry Scott to compensate him for this count?

$_____

If you have found against one or more of the defendants on this count what is the amount of punitive damages you award to Gerry Scott from one or more of the following defendants?

Sgt. Hernandez $_____
Sgt. James Francis $_____
Officer Nelson $_____
Officer Cannon $_____

Officer Spriggs $_____
Officer Le Boo $_____

AS TO THE CLAIM OF MALICIOUS PROSECUTION

(4) Was a malicious prosecution instituted against plaintiff, Gerry Scott?

Yes _____ No __X_____

If YES, indicate whether you find that one or more of the following defendants caused the malicious prosecution to be instituted.

Mr. Mojica _____
Sgt. Hernandez _____
Sgt James Francis _____
Officer Nelson _____
Officer Cannon _____
Officer Spriggs _____
Officer Le Boo _____

If you found against one or more of the defendants on this count, what compensatory damages do you award to Gerry Scott to compensate him for this count?

$_____

If you have found against one or more of the defendants on this count what punitive damages do you award to Gerry Scott to compensate him for this count as against the following defendants?

Mr. Mojica $_____
Sgt. Hernandez $_____
Sgt. James Francis $_____
Officer Nelson $_____
Officer Cannon $_____
Officer Spriggs $_____
Officer Le Boo $_____

AS TO THE CLAIMS OF ABUSE OF PROCESS

(5) Was an abuse of Process committed against plaintiff, Gerry Scott?

Yes X No _____

If YES, indicate which of the defendants caused the abuse of process:

Mr. Mojica Yes
Sgt. Hernandez Yes
Sgt. James Francis Yes
Officer Nelson Yes
Officer Cannon Yes
Officer Spriggs Yes
Officer Le Boo Yes

If you have found against one or more of the defendants on this count, what compensatory damages do you award Gerry Scott to compensate him for this count?

$ 10,000

If you have found against one or more of the defendants on this count, what damages do you award Gerry Scott in punitive damages as against the following defendants?

Mr. Mojica $ 26,000
Sgt. Hernandez $ 30,000
Sgt James Francis $ 30,000
Officer Nelson $ 12,000
Officer Cannon $ 12,000
Officer Spriggs $ 12,000
Officer Le Boo $ 12,000

AS TO THE CLAIM OF NEGLIGENCE

Were the defendants negligent in the treatment accorded by them to plaintiff, Gerry Scott?

Yes X No _____

If YES, indicate whether or not you so find as to one or more of the following defendants.

Mr. Mojica Yes
Sgt. Hernandez Yes
Sgt James Francis Yes
Officer Nelson Yes
Officer Cannon Yes
Officer Spriggs Yes
Officer Le Boo Yes

If you have found against one or more of the above defendants on this count what compensatory damages do you award to Gerry Scott to compensate him for this count?

$ 100,000

SIGNED: /s/ Michael E. Miller
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No: 92-1601

GERRY SCOTT

Plaintiff

v.

DISTRICT OF COLUMBIA GOVERNMENT, et al.,
Defendants

[Filed, MAR 4 1994, Clerk, U.S. District Court, District of Columbia]

VERDICT FORMS

We, the Jury unanimously find:

AS TO THE CLAIM OF PARTICIPATION OR RATIFICATION BY DEFENDANT, DISTRICT OF COLUMBIA GOVERNMENT, IN WRONGFUL ACTS OF THEIR EMPLOYEES, POLICE OFFICER DEFENDANTS

Do you find, Defendant, District of Columbia Government, acting through its police officer supervisors participated in or subsequently ratified the wrongful acts of omissions committed by their employees, police officer defendants?

Yes __X__ No _____

As to the claim that the defendant District of Columbia violated the plaintiff's constitutional rights, do you find for the plaintiff or the defendant?

Plaintiff __X__ Defendant _____

If for the plaintiff in what amount? __$50,000__

/s/ Michael E. Miller
Foreperson